U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLENE HOWARD and DEFENSE LOGISTICS AGENCY, San Antonio, TX

Docket No. 02-1471; Submitted on the Record;
Issued February 25, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the position of probation and parole officer fairly and reasonably represented appellant's wage-earning capacity, effective November 21, 2001; and (2) whether appellant is entitled to receive a schedule award for permanent impairment.

The Office accepted the conditions of postlaminectomy syndrome, back surgery and carpal tunnel syndrome as being work related and placed appellant on the periodic rolls.[1] Following referrals by the Office, appellant underwent an extensive vocational rehabilitation program from 1997 to January 31, 2000.

The medical evidence includes a December 21, 1999 report from Dr. J. Shane Ross, who noted appellant's complaints and performed a physical examination. The following assessment was provided: chronic back pain with documented spondylosis and surgery consistent with failed back syndrome; active myofascial pain syndrome affecting the hip girdle musculature on the right side, specifically the gluteus medius; no clinical features of a recurrent radiculopathy; and poor conditioning with moderate obesity. Dr. Ross opined that appellant had reached maximum medical improvement and noted, that, although appellant had myofascial and musculoskeletal pain syndrome that theoretically could respond to treatment, therapeutic efforts failed in the past. Under the fourth edition of the A.M.A., *Guides*, Dr. Ross further opined that appellant had a 20 percent whole person impairment under the lumbosacral category diagnosis of related estimate.

In a January 11, 2000 report, Dr. Kimberly A. Bouvette diagnosed L4-5 and L5-S1 degenerative disc disease symptoms postbilateral hemilaminotomy and foraminotomies. She advised that appellant had reached maximum medical improvement and that her clinical

[1] These conditions arose from an occupational claim of August 19, 1995 and are contained under master file number, 160282415.

condition was not likely to improve with further active medical treatment or surgical intervention. Further medical maintenance care was warranted. Dr. Bouvette opined that appellant could work light duty, exerting no more than 20 pounds of force occassionally and up to 10 pounds frequently in addition to being allowed frequent changes in position and no repetitive lumbar bending. Under the fourth edition of the A.M.A., *Guides*, Dr. Bouvette provided a diagnosed related impairment rating of 10 percent. For appellant's L4-5 and L5-S1 bilateral hemilaminotomies and foraminotomies, Dr. Bouvette assigned a 9 percent impairment rating, per Table 75 on page 113 IVB, for the single level decompression with residual signs and symptoms. Per IVE, an additional one percent was assigned as two levels were involved. A2 percent impairment rating was provided for abnormal lumbar range of motion. Under Table 81, page 183, a zero percent impairment was provided for lumbar flexion. This consisted of a 28-degree sacral range of motion and a 36-degree max true lumbar flexion angle. Under Table 81, page 128, a 0 percent impairment was provided for lumbar extension. This consisted of a 12-degree sacral range of motion and a 12-degree max true lumbar extension angle. Straight leg raising on the right was 72 degrees and straight leg raising on the left was 68 degrees. Dr. Bouvette noted that, as the sum of (28 degrees and 12 degrees equaled 40 degrees) was exceeded by the 68 degrees by more than 10 percent, the lumbar flexion and extension was invalidated. Under Table 82, page 130, lumbar right lateral flexion angle was 19 degrees and provided an impairment value of 1 percent. Lumbar left lateral flexion angle was 20 degrees and provided an impairment value of 1 percent. Under Table 75, page 113, motor and sensory examinations were unremarkable for focal deficitis and, therefore, zero impairment was assigned for neurologic deficits. Dr. Bouvette utilized the Combined Values Chart on page 322 of the 2 percent range in motion impairment with the 10 percent diagnositic impairment to provide a total 12 percent whole person impairment rating.

A May 18, 2000 physical therapy impairment report signed by Dr. Lonnie J. Lamprich advised that appellant had a 15 percent whole body impairment under the fourth edition of the A.M.A., *Guides*. Under Table 75, page 113, an 11 percent impairment value was assigned which was derived from a 10 percent impairment value for a diagnosis of L4-5, L5-S1 DDD symptoms postbilateral hemilaminotomy and foraminotomy, section IV Part B and 1 percentage added as there were two levels involved. The total impairment for lumbar range of motion was 4 percent. A 44-degree lumbar flexion resulted in a 5 percent impairment; a 10-degree lumbar extension resulted in a 5 percent impairment; straight leg raise right side was 46 degrees; straight leg raise left side was 52 degrees; lumbar right lateral flexion of 16 degrees resulted in a 2 percent impairment; lumbar left lateral flexion of 18 degrees resulted in a 2 percent impairment. It was noted that, as the straight leg raise range of motion of 46 degrees exceeded the sacral flexion/extension range of motion of 26 degrees by more than 15 degrees, the sacral flexion/extension measurements were not valid. Utilizing the Combined Values Chart on page 322, the 11 percent impairment for the spine disorder combined with the 4 percent lumbar range of motion resulted in a 15 percent whole body impairment.

In an April 9, 2001 report, Dr. Stephen Coupens, an orthopedic surgeon and appellant's treating physician, found that appellant had a negative straight leg raise in the sitting and supine positions on both legs. Normal muscle strength at five over five in all muscle groups of the lower extremities. Deep tendon reflexes were one plus over four plus in the knees and ankle. Subjectively, her sensory examination is normal. The radiographs showed some narrowing at

L4-5 and L5-S1, but otherwise no significant abnormalities were noted. Dr. Coupens opined that appellant was at maximum medical improvement. He advised that appellant could work with limited repetitive bending and stooping and lifting of no more than 25 pounds. Under the fourth edition of the A.M.A., *Guides*, Dr. Coupens further opined that appellant had an 11 percent whole person disability related to her second level disease, which had been operated on with some residual symptoms. In a June 25, 2001 addendum report, Dr. Coupens stated that, based on the fifth edition of the A.M.A., *Guides*, page 384, Table 15.3, appellant fit into the DRE lumbar category 3 and was entitled to a 12 percent impairment of the whole person.

The record indicates that, beginning 1997, extensive rehabilitative efforts were undertaken in an effort to return appellant to work. A November 24, 1998 work capacity evaluation noted that appellant was able to work full time as a social worker within her limitations which had previously been outlined along with a voice-activated assistance to eliminate repetitive use of the hands. Accordingly, the Office approved a recommended social work training program. Appellant received a Bachelor's of Science Degree in Human Ecology and was currently working on a Masters in Social Work at the University of Oklahoma. Despite extensive placement efforts and offering of wage-subsidy incentives, appellant did not secure employment and the Office closed the file January 31, 2000. In updated reports of August 13 and September 17, 2001, a rehabilitation counselor completed a labor market survey and determined that the position of probation officer -- parole officer, based on the Department of Labor's *Dictionary of Occupational Titles*, fit appellant's medical and vocational capabilities.

By letter dated October 11, 2001, the Office advised appellant that it proposed to reduce her compensation, based on her ability to earn wages as a probation and parole officer. The Office noted that the medical and vocational evidence of record demonstrated that she could perform the probation and parole officer position. The Office advised that, if appellant disagreed with its proposed action, she should submit contrary evidence or argument within 30 days. Appellant never addressed the Office's proposal, but instead responded with letters concerning her schedule award claim.

By decision dated November 21, 2001, the Office finalized the reduction of appellant's compensation, effective November 21, 2001, based on her capacity to earn wages as a probation and parole officer. The Office determined that the position fairly and reasonably represented appellant's wage-earning capacity and found that it was available in her commuting area. Appellant remained entitled to medical benefits for the effects of her injury.

Also, by decision dated November 21, 2001, the Office determined that appellant was not entitled to a schedule award of compensation under the Federal Employees' Compensation Act. The Office found that an impairment to appellant's spine was not a scheduled member under section 8107 of the Act and, thus, no schedule award could be paid. The Office additionally noted that none of the impairment evaluation reports indicated any impairment to appellant's lower extremities. Appellant remained entitled to medical benefits for the effects of her injury.

The Board finds that the Office properly reduced appellant's compensation benefits based on her wage-earning capacity as a probation and parole officer.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.[2] Under section 8115(a) of the Act,[3] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, wage-earning capacity is determined with due regard to the nature of injury, degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.[4]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.[5] Finally, by applying the principles set forth in *Albert C. Shadrick*, the employee's loss of wage-earning capacity can be ascertained.[6]

Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the award.[7]

The Board finds that, the based n the medical evidence of record, the selected position of probation and parole officer conforms with the restrictions set forth by Dr. Coupens. The Board notes that as the selected position requires occasional handling, occasional fingering and no feeling in its physical demands, this is consistent with appellant's medical restriction of no repetitive use of her hands. The Board, therefore, finds that the Office properly assessed appellant's physical impairment in determining that the position of probation and parole officer reasonably represented her wage-earning capacity. As noted above, the selected position must not only be medically suitable but must also be available in appellant's commuting area. The rehabilitation counselor, in this case, indicated in his September 17, 2001 report that the recommended position was reasonably available and that the position paid a monthly wage of

[2] *Garry Don Young*, 45 ECAB 621 (1994).

[3] 5 U.S.C. §§ 8101-8193.

[4] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); 5 U.S.C. § 8115(a).

[5] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[6] 5 ECAB 376 (1953); *see* 20 C.F.R. § 10.303.

[7] *See Don J. Mazurek*, 46 ECAB 447 (1995).

$2,185.00 in the open market. Appellant's compensation was accordingly reduced to reflect such wage-earning capacity under the principles set forth in *Shadrick*.[8]

The Board further finds that the Office properly determined that appellant is not entitled to receive a schedule award for permanent impairment under the Act.

Under section 8107 of the Act[9] and section 10.404 of the implementing federal regulations,[10] schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment*[11] has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[12]

Initially the Board notes that, although the A.M.A., *Guides* include guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the spine.[13] In 1960 amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[14]

In this case, the record reflects that, in a March 9, 2001 letter, the Office advised appellant that an updated impairment evaluation report based on the fifth edition of the A.M.A., *Guides* was needed. After receiving the June 25 and April 9, 2001 reports of Dr. Coupens, the Office sent all of the impairment reports received to its district medical adviser. In a November 1, 2001 report, the district medical adviser stated that he reviewed the reports submitted[15] and advised that as the spine was not a scheduled member and, it was for that reason,

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[8] *Supra* note 6.

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404 (1999).

[11] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ___ (Docket No. 01-1361, issued February 4, 2002).

[12] *See James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[13] *James E. Mills*, 43 ECAB 215 (1991).

[14] *See George E. Williams*, 44 ECAB 530 (1993).

[15] The district medical adviser reviewed Dr. Coupens April 9, 2001 and June 25, 2001 reports; Dr. Bouvette's January 11, 2000 report, and Dr. Ross's December 21, 1999 report. The Board notes that although the May 18,

he was unable to recommend any impairment based on impairment of the spine. He further stated that he was unable to identify any descriptions of abnormal findings in the lower extremities which would support an impairment resulting from the accepted condition. As there is no documented impairment due to sensory and/or motor loss of the extremities pursuant to section 15.12 of the A.M.A., *Guides*, the Office medical adviser properly concluded that no impairment could be assessed in appellant at the present time which would be eligible for a schedule award under the Act.

The November 21, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 25, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

2000 report from Dr. Lamprich was not reviewed, this is harmless error as the report failed to identify any descriptions of abnormal findings in the lower extremities which would support impairment resulting from the accepted condition.